

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARIA LIDIA DUTCIUC,)	Case No. EDCV 09-2177-OP
Plaintiff,)	
v.)	MEMORANDUM OPINION; ORDER
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
Defendant.)	

The Court¹ now rules as follows with respect to the disputed issues listed in the Joint Stipulation (“JS”).²

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¹ Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before the United States Magistrate Judge in the current action. (See Dkt. Nos. 8, 9.)

² As the Court stated in its Case Management Order, the decision in this case is made on the basis of the pleadings, the Administrative Record, and the Joint Stipulation filed by the parties. In accordance with Rule 12(c) of the Federal Rules of Civil Procedure, the Court has determined which party is entitled to judgment under the standards set forth in 42 U.S.C. § 405(g).

I.

DISPUTED ISSUES

As reflected in the Joint Stipulation, the disputed issues which Plaintiff raises as the grounds for reversal and/or remand are as follows:

- (1) Whether the Administrative Law Judge (“ALJ”) properly determined that Plaintiff was capable of performing work as an office messenger, usher, and information clerk;
- (2) Whether the ALJ properly considered Plaintiff’s credibility;
- (3) Whether the ALJ properly considered medical equivalency at step 3 of the sequential evaluation.

(JS at 2.)

II.

STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), this Court reviews the Commissioner’s decision to determine whether the Commissioner’s findings are supported by substantial evidence and whether the proper legal standards were applied. DeLorme v. Sullivan, 924 F.2d 841, 846 (9th Cir. 1991). Substantial evidence means “more than a mere scintilla” but less than a preponderance. Richardson v. Perales, 402 U.S. 389, 401, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971); Desrosiers v. Sec’y of Health & Human Servs., 846 F.2d 573, 575-76 (9th Cir. 1988). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson, 402 U.S. at 401 (citation omitted). The Court must review the record as a whole and consider adverse as well as supporting evidence. Green v. Heckler, 803 F.2d 528, 529-30 (9th Cir. 1986). Where evidence is susceptible of more than one rational interpretation, the Commissioner’s decision must be upheld. Gallant v. Heckler, 753 F.2d 1450, 1452 (9th Cir. 1984).

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1 **III.**

2 **DISCUSSION**

3 **A. The ALJ's Findings.**

4 The ALJ found that Plaintiff has the severe impairment of left arm
5 amputation below the elbow and arthritis. (Administrative Record ("AR") at 10.)
6 He also found that Plaintiff had the residual functional capacity ("RFC") to
7 perform a limited range of light work with the following limitations: Plaintiff is
8 able to lift and carry twenty pounds occasionally and ten pounds frequently with
9 the upper-right extremity, she cannot use the non-dominant³ upper extremity, and
10 she can frequently, but not constantly, use the upper-right extremity for fine and
11 gross manipulation. (*Id.* at 10-11.) Relying on the testimony of a vocational
12 expert ("VE"), the ALJ concluded that Plaintiff was capable of performing work
13 as an office messenger, an usher, and an information clerk. (*Id.* at 16.)

14 **B. The ALJ Properly Determined That Plaintiff Can Perform Alternative**
15 **Work.**

16 In her first claim, Plaintiff argues that the ALJ improperly found that
17 Plaintiff was capable of performing work as an office messenger, usher, and
18 information clerk. (JS at 3-6, 11.) Specifically, Plaintiff claims that she is unable
19 to exert "a negligible amount of force constantly," as is required for the office
20 messenger and usher jobs. She also argues that she would be unable to perform
21 the job of information clerk, as that job "is more likely than not" performed in the
22 current economy.⁴

23 _____
24 ³ The ALJ characterized Plaintiff's upper-left extremity as "non-dominant."
25 (AR at 10.) However, in her March 23, 2007, Function Report, Plaintiff stated
26 that prior to her amputation she was left handed. (*Id.* at 113.)

27 ⁴ Plaintiff does not challenge the ALJ's RFC assessment, but rather only
28 challenges the ALJ's conclusions as to Plaintiff's ability to perform the jobs at

(continued...)

1 In finding that Plaintiff maintained the RFC to perform a limited range of
2 light work, the ALJ concluded that Plaintiff could “frequently - but not constantly
3 - use the right upper extremity for fine and gross manipulation.” (AR at 11.)
4 Plaintiff claims that such a restriction is contrary to the Dictionary of Occupational
5 Title’s (“DOT”) definition of “light work,” which includes the jobs of office
6 messenger and usher, because the DOT defines light work as requiring the
7 exertion of “a negligible amount of force constantly to move objects.” (JS at 4.)

8 Preliminarily, Plaintiff’s argument is misleading, as the ALJ’s RFC limiting
9 Plaintiff to frequent fine and gross manipulation is not the same as the DOT
10 description for light work regarding exerting a negligible amount of force to move
11 objects. Moreover, as explained by Defendant, the DOT definition of light work
12 does not necessarily require a constant exertion of a negligible amount of force.
13 Rather, the DOT defines light work as requiring “[e]xerting up to 20 pounds of
14 force occasionally, **and/or** up to 10 pounds of force frequently, **and/or** a
15 negligible amount of force constantly . . . to move objects.” DOT (4th Ed. 1991),
16 App. C (emphasis added). The ALJ found Plaintiff capable of performing only a
17 limited range of light work, lifting and carrying twenty pounds occasionally and
18 ten pounds frequently, a finding consistent with the DOT definition of light work.

19 Moreover, it is apparent from the expert testimony at Plaintiff’s hearing that
20 the specific jobs at issue were not the type of light work that demanded physical
21 requirements beyond Plaintiff’s RFC. The VE specifically considered Plaintiff’s
22 limitations as found by the ALJ and concluded that Plaintiff would be capable of
23 performing the jobs of office messenger and usher as they are performed in the
24 national economy. The VE further testified that his opinion was not inconsistent
25 with the DOT. (AR at 37-39.)

26 Plaintiff’s alternative arguments for why she is unable to perform the jobs at

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28 ⁴(...continued)
issue in light of that RFC.

1 issue also fail. There is no evidence in the record to support Plaintiff's complaint
2 that performance of the job of office messenger would "exacerbate" her right arm
3 impairments. Even if there was such evidence, this argument does not establish
4 that Plaintiff is physically unable to perform job tasks at this time, but rather urges
5 a finding of disability based on the potential for exacerbation of her symptoms at
6 some time in the future. This is not the standard for a finding of disability.

7 Similarly, Plaintiff's arguments that it would be "impractical" for her to
8 perform the job of usher based on tasks presumably required by that job, such as
9 handing out programs or changing advertising displays, is faulty. The VE
10 considered Plaintiff's impairments and concluded that she could perform the job
11 of usher as it is performed in the national economy. In fact, the VE supplied the
12 ALJ with an "eroded" number of usher positions in the economy that Plaintiff
13 would be capable of performing, indicating that the VE considered only the
14 positions that Plaintiff could perform in light of her specific physical impairments.
15 (Id. at 38.) Plaintiff has not shown the VE's testimony to be unreliable. See Carey
16 v. Apfel, 230 F.3d 131, 146 (5th Cir. 2000) (ALJ properly relied on VE testimony
17 that a one-armed claimant could perform job as a ticket taker where claimant's
18 argument on appeal "reduce[d] to a factual disagreement about whether a person
19 with one arm" could perform the job at issue).

20 Finally, Plaintiff argues that she cannot perform the job of information clerk
21 as that job "is more likely than not" performed. Again, Plaintiff relies on
22 presumptions of what the job requires, including having to enter information into a
23 computer system as part of her record-keeping duties, which she claims would be
24 "problematic" because she has limited use of her lower-right extremity due to
25 wrist pain and multiple erosions in the carpal tunnel bones. (JS at 4-5.) However,
26 the VE gave expert testimony that Plaintiff would be capable of performing this
27 job as it is performed in the national economy. Plaintiff's unsupported
28 presumptions are insufficient to call into doubt the testimony of the VE. See

1 Russell v. Bowen, 856 F.2d 81, 83 (9th Cir. 1988) (“Questions of credibility and
 2 resolutions of conflicts in the [VE’s] testimony are addressed to the ALJ.”); see
 3 also Carey, 230 F.3d at 146.

4 Based on the foregoing, the Court finds that the ALJ properly determined
 5 that Plaintiff can perform alternative work. Thus, there was no error.

6 **C. The ALJ Failed to Properly Considered Plaintiff’s Credibility.**

7 Next, Plaintiff contends that the ALJ improperly rejected her subjective
 8 complaints of impairment. (JS at 12-15, 18.)

9 In his decision, the ALJ rejected Plaintiff’s credibility as follows:

10 After considering the evidence of record, the undersigned finds
 11 that the claimant’s medically determinable impairments could
 12 reasonably be expected to produce the alleged symptoms, but the
 13 claimant’s statements concerning the intensity, persistence and limiting
 14 effects of these symptoms are not entirely credible.

15 (AR at 12.)

16 An ALJ’s assessment of pain severity and claimant credibility is entitled to
 17 “great weight.” Weetman v. Sullivan, 877 F.2d 20, 22 (9th Cir. 1989); Nyman v.
 18 Heckler, 779 F.2d 528, 531 (9th Cir. 1986). When, as here, an ALJ’s disbelief of a
 19 claimant’s testimony is a critical factor in a decision to deny benefits, the ALJ
 20 must make explicit credibility findings. Rashad v. Sullivan, 903 F.2d 1229, 1231
 21 (9th Cir. 1990); Lewin v. Schweiker, 654 F.2d 631, 635 (9th Cir. 1981); see also
 22 Albalos v. Sullivan, 907 F.2d 871, 874 (9th Cir. 1990) (an implicit finding that
 23 claimant was not credible is insufficient).

24 Under the “Cotton test,” where the claimant has produced objective medical
 25 evidence of an impairment which could reasonably be expected to produce some
 26 degree of pain and/or other symptoms, and the record is devoid of any affirmative
 27 evidence of malingering, the ALJ may reject the claimant’s testimony regarding
 28 the severity of the claimant’s pain and/or other symptoms only if the ALJ makes

1 specific findings stating clear and convincing reasons for doing so. See Cotton v.
2 Bowen, 799 F.2d 1403, 1407 (9th Cir. 1986); see also Smolen v. Chater, 80 F.3d
3 1273, 1281 (9th Cir. 1996); Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993);
4 Bunnell v. Sullivan, 947 F.2d 341, 343 (9th Cir. 1991).

5 To determine whether a claimant's testimony regarding the severity of his
6 symptoms is credible, the ALJ may consider, *inter alia*, the following evidence:
7 (1) ordinary techniques of credibility evaluation, such as the claimant's reputation
8 for lying, prior inconsistent statements concerning the symptoms, and other
9 testimony by the claimant that appears less than candid; (2) unexplained or
10 inadequately explained failure to seek treatment or to follow a prescribed course of
11 treatment; (3) the claimant's daily activities; and (4) testimony from physicians
12 and third parties concerning the nature, severity, and effect of the claimant's
13 symptoms. Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002); see also
14 Smolen, 80 F.3d at 1284. The Social Security Rulings ("SSR") further provide
15 that an individual may be less credible for failing to follow prescribed treatment
16 without cause. SSR 96-7p.

17 Here, it appears the ALJ gave no reasons for rejecting Plaintiff's credibility.
18 To the extent that the ALJ intended to rely on his discussion of the medical record
19 as support for his credibility determination (see AR at 12-14), his analysis was not
20 specific and did not provide clear reasons for rejecting Plaintiff's credibility. The
21 fact that the Court cannot determine whether the ALJ's discussion of the medical
22 record was intended to lend support for his credibility determination is proof that
23 the ALJ was not "sufficiently specific to allow a reviewing court to conclude the
24 ALJ rejected the claimant's testimony on permissible grounds and did not
25 arbitrarily discredit the claimant's testimony." Moisa v. Barnhart, 367 F.3d 882,
26 885 (9th Cir. 2004) (citations and internal quotation marks omitted). Thus, the
27 Court finds that the ALJ's credibility determination was error, and this action must
28 be remanded to allow the ALJ to properly consider Plaintiff's subjective

1 complaints of impairment.

2 **D. Consideration of Medical Equivalence.**

3 Finally, Plaintiff contends that the ALJ failed to properly consider whether
4 Plaintiff's impairments met or medically equaled a listed impairment.
5 Specifically, Plaintiff argues that the ALJ erred in finding that Plaintiff's
6 impairments did not medically equal Listing 1.02 in light of her right wrist
7 arthritis. (JS at 19-21, 23-24.)

8 In his decision, the ALJ concluded that Plaintiff's impairments "do not meet
9 or equal any of the 1.00 (musculoskeletal system) series of impairments." (AR at
10 10.)

11 If the ALJ concludes at step two of the sequential evaluation that the
12 plaintiff's impairments are "severe" within the meaning of the Act, the ALJ
13 proceeds at step three of the sequential evaluation to compare the plaintiff's
14 impairments to the impairments listed in the "Listing of Impairments" set forth in
15 20 C.F.R. pt. 404, subpt. P, App.1. See 20 C.F.R. § 416.925. If any "severe"
16 impairment, or combination of "severe" impairments, meets or equals a listed
17 impairment, the plaintiff is deemed disabled. Id.

18 The plaintiff's impairment need not precisely meet the criteria of the listing
19 in order to obtain benefits. If the plaintiff's impairment or combination of
20 impairments is medically equivalent to one in the listing, disability is presumed,
21 and benefits are awarded. 20 C.F.R. § 404.1520(d); Barker v. Sec'y of Health &
22 Human Servs., 882 F.2d 1474, 1477 (9th Cir. 1989). Medical equivalence will be
23 found if the medical findings are at least equal in severity and duration to the listed
24 findings. Marcia v. Sullivan, 900 F.2d 172, 175 (9th Cir. 1990). To determine
25 medical equivalence, the Commissioner compares the symptoms, signs, and
26 laboratory findings concerning the alleged impairment with the medical criteria of
27 the listed impairment. 20 C.F.R. §§ 416.929, 416.928. The decision is based
28 solely on the medical evidence, which must be supported by medically acceptable

1 clinical and laboratory diagnostic techniques. Id.

2 As relevant here, Listing 1.02 requires the “involvement of one major
3 peripheral joint in each upper extremity (i.e. shoulder, elbow, or wrist-hand),
4 resulting in inability to perform fine and gross movements effectively, as defined
5 in 1.00B2c.” 20 C.F.R. pt. 404, subpt. P., App. 1, § 1.02. In turn, section
6 1.00(B)(2)(c) defines the “inability to perform fine and gross movements
7 effectively” as:

8 [A]n extreme loss of function of both upper extremities; i.e., an
9 impairment(s) that interferes very seriously with the individual’s ability
10 to independently initiate, sustain, or complete activities. To use their
11 upper extremities effectively, individuals must be capable of sustaining
12 such functions as reaching, pushing, pulling, grasping, and fingering to
13 be able to carry out activities of daily living. Therefore, examples of
14 inability to perform fine and gross movements effectively include, but
15 are not limited to, the inability to prepare a simple meal and feed
16 oneself, the inability to take care of personal hygiene, the inability to
17 sort and handle papers or files, and the inability to place files in a file
18 cabinet at or above waist level.

19 20 C.F.R. pt. 404, subpt. P, App.1, § 1.00(B)(2)(c).

20 It is clear from the record that Plaintiff has arthritis in her right wrist,
21 accompanied by pain, swelling, numbness, decreased grip strength, and positive
22 findings on MRI. (AR at 152, 160, 188, 237, 243.) Plaintiff acknowledged during
23 her consultative psychiatric evaluation that she can “do household chores,” “bathe
24 and shower,” “make easy food,” and drive. (Id. at 165.) However, Plaintiff
25 claimed in her March 23, 2007, Function Report that she sometimes needs help
26 dressing, needs help washing her hair, needs help in unspecified personal care,
27 only does laundry with the assistance of her husband, and can only lift up to
28 fifteen pounds. (Id. at 108-15.) In addition, at the hearing before the ALJ,

1 Plaintiff testified that it is “really hard” for her to lift a carton of milk, (id. at 25),
 2 that she drives for seven minutes to pick up her children from school but that she
 3 needs a special knob on her steering wheel, (id. at 27, 32), her hand goes numb
 4 “for some time,” (id. at 29), it’s “really hard” to move her fingers enough to work
 5 on a computer, (id. at 30), and that she could use her hand for fingering and fine
 6 manipulation for thirty minutes before it starts to hurt (id. at 30).

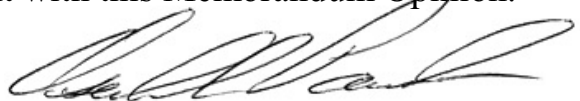
7 It is impossible to assess whether Plaintiff meets or equals Listing 1.02 in
 8 light of her subjective complaints without an adequate analysis of Plaintiff’s
 9 credibility. Accordingly, on remand, the ALJ shall reconsider whether Plaintiff
 10 meets or equals a listed impairment in light of his decision regarding Plaintiff’s
 11 credibility.⁵ Depending on the ALJ’s revised analysis of Plaintiff’s credibility, he
 12 may also have to reconsider whether Plaintiff is capable of performing alternative
 13 work.

14 IV.

15 ORDER

16 Pursuant to sentence four of 42 U.S.C. § 405(g), IT IS HEREBY
 17 ORDERED THAT Judgment be entered reversing the decision of the
 18 Commissioner of Social Security and remanding this matter for further
 19 administrative proceedings consistent with this Memorandum Opinion.

20
 21 Dated: October 4, 2010



22 HONORABLE OSWALD PARADA
 23 United States Magistrate Judge
 24
 25
 26

27 ⁵ The Court expresses no view on the veracity of Plaintiff’s subjective
 28 complaints or whether they are sufficient for a finding that her impairments meet
 Listing 1.02.